No. 2055

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY,

Bankrupt.

PURCELL SAFE COMPANY, a corporation,

Appellant,

vs.

NELSON W. PARKER as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE.

S. C. Osborn, doing business as S. C. Osborn & Company, at Seattle, Washington, was adjudicated

a bankrupt and Nelson W. Parker, the appellee, was duly appointed trustee of the bankrupt estate by decree of the District Court entered December 28, 1910. Said trustee duly qualified as such, and took possession of the said estate including a group of one thousand and twenty safe deposit boxes which the appellant built for the said bankrupt and installed at the latter's place of business on and prior to February 16, 1910. The appellant, on May 6, 1911, presented to the Hon. John P. Hoyt, referee in bankruptcy, to whom the case had been referred by the District Court, a petition, alleging among other things, that the said deposit boxes had been sold and delivered by the petitioner to the said bankrupt pursuant to a conditional sale contract, in writing, entered into between said petitioner and the said S. C. Osborn, doing business as S. C. Osborn & Company, on the 16th day of February, 1910; that the agreed price for said boxes was $5,174.00, of which $2,000 was paid in cash on said date; that the balance was to be paid in twelve months from said date with interest at 7% per annum, and was evidenced by the promissory note of said S. C. Osborn, doing business as S. C. Osborn & Company, made and delivered simultaneously with the making of said conditional contract; that in said contract it was agreed, among other things, that the said Purcell Safe Company did not part with or relinquish its title to the said personal property until the said note should be fully paid, and that in default of payment of said note, said Purcell Safe Company might

take possession of and remove said personal property; that the said contract was duly filed in the office of the auditor of King County, Washington, on the 21st day of February, 1910; that on the 16th day of February, 1911, the sum of $3,174.00 and interest since February 16, 1910, at the rate of 7% per annum, became due and payable to said Purcell Safe Company from said S. C. Osborn & Company by virtue of the terms of said contract; that said sum and interest had not been paid nor any part thereof, except the interest thereon to August 16, 1910, and that by reason of the default in said payment said Purcell Safe Company became, and is, entitled to the immediate possession of said personal property. The said petition further alleged that the petitioner had demanded of said S. C. Osborn, doing business as S. C. Osborn & Company, and of said trustee, the possession of the said property, but they had refused to deliver the same to said Purcell Safe Company without the order of the Court, and concluded with the prayer that upon hearing the Court order and direct the said trustee to forthwith deliver possession of said personal property to said Purcell Safe Company. The trustee by his answer to said petition "put the said petitioner on proof as to all matters and things in said petition set forth" and in particular denied that the petitioner had any conditional sale contract whereby the title to the property mentioned in said petition was reserved in the petitioner. From the testimony taken in support of the said petition and the exhibits introduced in evidence, the

referee found that the instrument relied upon as constituting a conditional sale contract was in the form of an order directed to the Purcell Safe Company, signed by S. C. Osborn Company and S. C. Osborn, and written upon the stationery of the said Purcell Safe Company, a corporation, which said stationery had printed thereon at the bottom below where the order was signed by the said S. C. Osborn the words "Purcell Safe Co."; that this order was filled out by an agent of said Purcell Safe Company signed by the said Osborn in his presence and delivered by him in the ordinary course of business and that in pursuance thereof the property described therein was delivered to the said S. C. Osborn and thereafter and within the time provided by law, the said instrument was duly recorded in the auditor's office of the proper county. From these facts the referee concluded that the sale became absolute, notwithstanding the recording of the order, being of the opinion that the contract was not signed by the vendor within the meaning of the statute of the State of Washington, relating to conditional sales, which is as follows:

"All conditional sales of personal property or leases thereof containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, incumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions *and signed by the vendor and vendee,* shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking

possession of the property, the vendee resides." (Italics ours.)

Pierce's Washington Code (Ed. 1905), Sec. 6547.

2 Rem. & Bal. Annotated Codes and Statutes of Washington, Sec. 3670.

The appellant, in due time, filed a petition for review of the order of the referee entered in accordance with his findings and conclusion as above set forth, in which petition the appellant states that the order of the referee was and is erroneous in the following particulars:

"(a) In finding that the conditional sale contract mentioned in the petition of said Purcell Safe Company was not signed by it as required by the laws of the State of Washington.

(b) In finding that the sale of the property mentioned in said contract to the bankrupt was and is an absolute and unconditional sale.

(c) In adjudging that said petition of the Purcell Safe Company for the return of said property be denied.

(d) In adjudging that the said conditional sale contract is invalid and of no force or effect.

(e) In adjudging that the sale of said Purcell Safe Company to said bankrupt of the property described in said contract was and is an unconditional and absolute sale thereof.

(f) That said order is contrary to law and is not supported by the proof at the hearing of said petition." (Record, pp. 24, 25.)

Thereupon the referee transmitted to the District Court his certificate as required by law and with it

the original petition of said Purcell Safe Company, the answer of the trustee thereto, the exhibits introduced upon the hearing, together with a transcript of the evidence in such hearing, the order made upon such hearing and the said petition for review.

On the 25th day of August, 1911, the District Court, Hon. C. H. Hanford presiding, made and entered an order adjudging and decreeing (1) that the decision and order of the referee be confirmed; (2) that the petition of the said Purcell Safe Company for the return of the property described in the contract referred to in said petition be denied; (3) that the said contract claimed by said petitioner as conditional sale contract be adjudged and decreed to be invalid and of no force or effect; (4) that the sale made by the petitioner, the Purcell Safe Company to the bankrupt of the property described in said contract was and is an unconditional and absolute sale thereof. (Record p. 32.)

The appellant duly excepted to said order and every part thereof, wherein the same is deemed erroneous. Its petition for appeal to this Court was duly allowed and its appeal perfected on the 30th of September, 1911.

SPECIFICATION OF ERRORS.

I.

The United States District Court in and for the Western District of Washington, Honorable C. H.

Hanford presiding, erred in adjudging and decreeing that the contract claimed by appellant to be a conditional sale contract was and is invalid and of no force or effect.

II.

The said Court erred in adjudging and decreeing that the sale made by the appellant to the bankrupt of the property described in said contract was and is an unconditional and absolute sale thereof.

III.

The said Court erred in adjudging and decreeing that the petition of the appellant for the return of the property described in said contract be denied and is denying the same.

IV.

The said Court erred in confirming the decision and order of the referee.

BRIEF OF THE ARGUMENT.

The only question presented by the foregoing specification of errors is whether or not the instrument in writing, signed by the bankrupt on February 16, 1910, and by him delivered to appellant and claimed by the appellant to be a conditional contract of sale, was and is a valid conditional sale contract under the laws of Washington. If that question is answered in the affirmative, all of appellant's assign-

ment of error must be sustained. The answer to that question depends simply and only upon the answer to another question, which is: Was the said instrument "signed" by the vendor as required by the Washington statute? The order of the referee, his certificate and return and the memorandum opinion of the District Court, all show that the instrument relied upon by the appellant as constituting a conditional sale contract was held to be invalid and of no force and effect as a conditional sale contract, for the sole reason that in the opinion of the referee and of the Court the said instrument was not *signed* by the appellant within the meaning of the statute of the State of Washington relating to conditional sales.

The statute in question has already been quoted in full in this brief. It requires that the memorandum of the sale be "signed by the vendor and vendee." Was the instrument appellant relies upon "signed by the vendor"? A copy and a fac-simile of said instrument were introduced in evidence and filed before the referee and transmitted by him to the District Court, and by stipulation of the parties to this controversy the original instrument has been taken from the files of the office of the Auditor of King County and inserted in the record of this case (Record, pp. 18-20, 47). The Court will notice that the said instrument does not bear any signature of the vendor, the Purcell Safe Company, except the printed name of the said company at the bottom of the instrument, and that the instrument is in the form of an order directed to the Purcell Safe Com-

pany, whose name is also printed at the left hand upper corner of said instrument immediately above the words "Please deliver, etc."

The evidence shows, without contradiction, that one James Lynch, the sales manager of appellant, conducted all the negotiations leading to the sale of said deposit boxes, that he filled out the blanks in the said instrument, that all the conditional sale contracts made by appellant, while the said James Lynch was sales manager, a period of five years and a half, and for several years before that time, were made in the form shown in the said instrument, that is, in the form of an order for the goods sold written on a blank form provided by appellant, with the name of appellant printed at the head and at the bottom of said blank; that no one was authorized or allowed to use any other form of signature or any other name except the printed name of the company found on the contract; that such was the invariable custom of the officers of the company in making conditional sale contracts; that after the said S. C. Osborn had signed the said instrument in duplicate, one copy thereof was delivered to the said Osborn by said James Lynch and the other was retained by said James Lynch for the appellant; that the latter copy was filed, within the time required by law, with the auditor of King County, at the request of the appellant (Record, p. 20). Under such evidence it is clear that the instrument was signed by appellant within the meaning of the statute.

"The word 'sign' as a verb has several shades of

meaning and hence a statutory requirement that an instrument in writing, or a pleading shall be signed by some person or officer to make it complete, is much more general and comprehensive than a similar requirement that such instrument or pleading must be subscribed by the person or officer * * *. On the same principle the 'signing' of a written instrument or pleading by a person or officer has a much broader and more extended meaning than attaching his 'written signature' to it implies. When a person attaches his name or causes it to be attached to a writing by any of the known modes of impressing his name on paper with the intention of signing it, he is regarded as having 'signed' the writing."

Hamilton v. State, 2 N. E. 299, 300 (Ind.)

In that case it was held that where the name of the prosecuting attorney appeared in print on an indictment this was a sufficient compliance with a statute requiring the indictment to be "signed" by the prosecuting attorney.

In *Cummings v. Landes,* 117 N. W. 22, the Supreme Court of Iowa held that a printed notice of a suit to foreclose a mortgage containing the printed signature of the attorney for the plaintiff was sufficient compliance with a statute requiring such notice to be "signed by the plaintiff or his attorney." The Court said:

"Our statute requires that the original notice be 'signed by the plaintiff or his attorney.' This is to authenticate it as coming from the plaintiff in the action. A written signature is not in terms exacted. To sign, in the primary sense of that expression, means to make a mark, and the signature is the sign thus made. By long usage, however, influenced, no doubt, by the spread of learning, signature has come

ordinarily to be understood to mean the name of a person attached to something by himself, and therefore to be nearly synonymous with 'autograph.' This signification is derivative, however, and not inherent in the word itself. In re *Walker's Estate,* 110 Cal. 387; 42 Pac. 815; 30 L. R. A. 460; 52 Am. St. Rep. 104."

"Looking at the original meaning of the word, in connection with the usage since the people generally have become able to write their own names, we have no trouble in reaching the conclusion that, as employed in the statute, no more is exacted than that the name of plaintiff or that of his attorney be attached to the notice by any of the known methods of impressing the name on paper, whether this be in writing, printing, or lithographing, provided it is done with the intention of signing or be adopted in issuing the original notice for service."

The Supreme Court of Iowa says that the statute required the notice to be "signed by the plaintiff or his attorney * * * *to authenticate it as coming from the plaintiff in the action.*" (Italics ours.) The statute of the State of Washington requires conditional sale contracts to be "signed by the vendor and vendee" in order that third persons may know who the vendor and vendee are, and any signature which enables third persons examining the records to ascertain who is the vendor or vendee in a certain conditional bill of sale should be held sufficient under the statute.

In *Schneider v. Norris,* 2 M. & S. 286, it was held that a bill of particulars in which the name of the vendor was printed, and that of the vendee written by the vendor, was a sufficient memorandum of the

contract within the statute of frauds to charge the vendor. And Lord Ellenborough said:

"If this case had rested merely on the printed name, unrecognized by and not brought home to the party, as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt, whether it would not have been intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged, by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance as if he had written 'Norris & Co.' with his own hand. He has, by his handwriting, in effect, said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract."

In this case by taking the instrument to the office of the auditor of King County and requesting that the said instrument be filed in the manner required by law in the case of conditional sale contracts, the appellant acknowledged that the printed words "Purcell Safe Co." was its signature, and that a conditional sale contract in the terms mentioned in said instrument had been entered into by appellant and the said S. C. Osborn, and the endorsement, "Filed at the request of vendor, Feb. 21, 1910, at 31 min. past 3 P. M. Records of King County, Washington. Otto A. Case, County Auditor, J. F. Lottsfeldt, Deputy," on the back of said instrument, made known to any one who saw fit to examine the records of King County the fact that the property described

in said instrument had been sold to said Osborn by appellant by an instrument reserving title to the appellant until complete payment of the purchase price.

In *Drury v. Young,* 58 Md. 546; 42 Am. Rep. 343, the Court, in construing the Maryland statute of frauds, held that the note or memorandum in writing required by the statute was sufficiently signed when the name of the party to be charged was printed in a letter head of the vendor. Referring to *Higdon v. Thomas,* 1 H. & G. 152 (Md.), the Court said:

"This decision of our court settles the question that the place of the signature in the memorandum is immaterial and the English cases are equally emphatic that the name may as well be printed as written, if the printed name is adopted by the party to be charged."

In Williston on Sales it is stated that the signature to the memorandum required by the statute "may be made in pencil, or rubber stamp, or a printed signature already on the paper may be adopted."

Williston on Sales, p, 139.

In Benjamin on Sales, §§ 259-264 (Ed. 1888), the same rule is laid down.

Under these authorities, and others which might be cited, the instrument in question in this case was sufficiently signed to comply with the statute of Washington providing "that no contract for the sale of goods, wares, or merchandise for the price of fifty dollars or more, shall be good and valid, unless

* * *, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby." (2 Rem. & Ball. Code, §5290.)

There is no reason why a contract sufficiently signed to be enforceable under the statute of frauds should not be sufficiently signed to be valid as a conditional sale contract. The statute relating to conditional sales does not require a signature different from that required by the statute of frauds. Under the latter statute any signature adopted by the party to be charged is sufficient. Under the conditional sale statute it should be held that any signature is sufficient as long as third parties may know that it is the signature which the parties have adopted. The record of the instrument in this case disclosed the fact that the Purcell Safe Company was the vendor of the goods described in said instrument, that said instrument was recorded *at the request of said vendor,* which fact clearly indicated that said vendor had adopted, as its signature, the name printed on said instrument.

We respectfully submit that the decree of the Honorable District Judge should be reversed.

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